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75-965

IN THE

Supreme Court of the United States

October Term, 1975

JAMES STRONG, *et al.*,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Seneca Cayuga Tribe of Oklahoma* respectfully prays that a writ of certiorari issue to review the judgment and the Order of the United States Court of Claims entered in this proceeding on May 30, 1975 in respect of which a motion for rehearing was denied by Order of that court dated October 10, 1975. This petition is being filed simultaneously with another petition for review of orders of the Court of Claims of the same date upon similar grounds but related to an earlier treaty (1805). The issues are identical though the parties to be affected are different by virtue of the differences in use and occupation. It is requested they be read together.

* The Seneca Cayuga Tribe of Oklahoma was the petitioner in Dockets 341C and 341D before the Indian Claims Commission. These Dockets were consolidated for trial with six other Indian tribes who had claimed title to portions of the area involved, whose names and docket numbers will be found in the Opinion of the Indian Claims Commission set forth in Appendix B.

Opinions Below

The Court of Claims entered an Order on May 30, 1975 approving and affirming the decision and Order of the Indian Claims Commission and remanding the case to the Commission for further proceedings. No opinion was rendered other than a recital in the Order that the Findings of Fact made by the Indian Claims Commission could have been fuller and more extensive. Judge Bennett dissented, in part, from the conclusion stated in the Order. The Order and the dissent are reprinted in Appendix A. The Order of October 10, 1975 denying the motion for rehearing is also reprinted in Appendix A.

The opinions and findings of the Indian Claims Commission, 30 Ind. Cl. Comm. 8 and 31 Ind. Cl. Comm. 359 are reprinted in Appendices B and C.

Jurisdiction

The judgment of the Court of Claims was entered on May 30, 1975. A motion for rehearing was made and an Order denying such motion was made and entered on October 10, 1975. No extensions of time to petition for certiorari were sought. This Court has jurisdiction under 25 U.S.C. §70s(c) and 28 U.S.C. §1255.

Questions Presented

Where as detailed in the statement of the case: The ancestors and predecessors in interest of the petitioner used and occupied as Indians the area ceded to the United States under the terms of the Treaty of Fort Industry (7 Stat. 87,

July 4, 1805) from as early as 1742 until the treaty date and under which treaty they are described as living with named parties to the treaty and were to receive a portion of the purchase price and for whom the representative of their ancestors separately signed the Treaty of Greeneville (7 Stat. 49, August 3, 1795) in a manner clearly indicating the separate identity of the tribal group on whose behalf he was acting, THE QUESTIONS PRESENTED ARE:

1. Is an Indian tribe separately signing the Treaty of Greeneville (7 Stat. 49), though not named in the preamble and admittedly occupying portions of the lands ceded in the "follow-up" treaty barred from recovering a portion of a conscionable consideration by reason of the omission of its name from the preamble of the treaty and thus derived no rights thereunder?

2. Is an Indian tribe whose ancestors and predecessors in interest used and occupied for upwards of 60 years portions of lands ceded to the United States barred from recovering a conscionable consideration under the Indian Claims Commission Act because more than one tribe shared such use and occupancy within the bounds of the particular lands ceded where the only finding by the Indian Claims Commission of such use and occupancy was a single summary one of joint use and occupancy by various tribes including the ancestors of petitioner herein?

3. Is it morally just and equitable and consonant with the "fair and honorable dealing" prescribed within the aims and purposes of the Indian Claims Commission Act to deny compensation to one tribe on the basis of a technical interpretation of a recently stratified legal principle

and award that share of the compensation which might have been awarded to the petitioner, absent such technicality, to other tribes some of whom did not use and occupy the lands in as extensive a manner, both as to time and area?

4. Should not this Court re-examine the purposeful rigidity with which the Indian Claims Commission and the Court of Claims have applied the general principles describing aboriginal title as related to the compensable interests of Indian occupants, which principles were discussed in *United States* v. *Santa Fe* (314 U.S. 339), which rigidity denies to Indians their own right of shared occupancy and confers its economic benefits to others, and in certain cases to the United States, in violation of the express promise made by the United States in 1795?

Statutes and Treaties

Pertinent provisions of the Treaty of Greeneville of August 3, 1795 (7 Stat. 49) are set forth in Appendix D.

Statement of the Case

The petitioner, Seneca Cayuga Tribe of Oklahoma consists of decendants of various Iroquois Indians at one time members of the Six Nations and its constituent tribes* who for many years and up until the treaty date, used and occupied lands now in the State of Ohio and which lands were acquired by the United States under the terms of two Treaties: September 29, 1817, 7 Stat. 160 and September

* A confederacy consisting of the Seneca, Cayuga, Mohawk, Onondaga, Oneida and Tuscarora Nations.

17, 1818, 7 Stat. 178. At various times during the period of occupancy the ancestors of the petitioner were generally referred to as "Mingos", "Senecas", "Senecas of Ohio, Senecas of Sandusky", "Mohawks" and "Six Nations of Sandusky".*

These Indians used and occupied portions of the area from as early as 1742 and continuously up until 1817. The use and occupancy was not exclusive, but was joint and amicable with one or more Indian tribes. The number of joint and amicable users was somewhat dependent upon the time and the then existing conditions but at no time was there evidence of inter-tribal hostility. The contrary was frequently evidenced by joint occupancy of the same villages.

The nature and extent of the use and occupancy by petitioner's predecessors in interest will be found in Appendix E which contains a portion of the proposed findings submitted by petitioner to the Indian Claims Commission.

On August 3, 1795 at Greeneville the United States entered into a treaty with a group of Indian tribes then belonging to a combination called the Northern Confederacy who were situated in the old Northwest Territory. 7 Stat. 49. Among the signers was one Reyntueco "1 of the Six

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* *Strong, et al.* v. *United States*, 31 Ind. Cl. Comm. 89, 156, Court of Claims Appeal 1974, June 25, 1975, *cert. denied* December 1975 (Dkt. 75-389).

> "'Mingo' is the term usually used to describe certain Iroquois Indians, largely Senecas, who had left the villages of the main Iroquois Confederacy and formed new settlements in Pennsylvania and Ohio. By the time of the Greeneville Treaty in 1795 they were usually referred to as "Senecas of Sandusky." (See, Hodge, Handbook of American Indians (1907), Part I, at 867)."

Nations living at Sandusky". The United States acquired certain lands and "relinquished" to the Indians lands north and west of a line described in the treaty and "explicitly declared that the meaning of that relinquishment is this: The Indian tribes who have a right to these lands are quietly to enjoy them—and the United States will protect all the said Indian tribes in the quiet possession of their lands.—"

Shortly prior to the treaty of Greeneville, The Six Nations, then and now, residing in New York entered into a treaty with the United States on November 7, 1794 at Canadaigua whereby they agreed to confine themselves to a described territory in New York and relinquished all claims to lands west of New York and Pennsylvania. 7 Stat. 44.

By a treaty dated September 29, 1817, 7 Stat. 160, and a treaty supplementary thereto dated September 17, 1818, 7 Stat. 178, both of which were proclaimed on January 4, 1819 the United States purchased, from a group of Indian tribes, Royce Areas 87 and 88 situated in Northwestern Ohio. Area 87 contained approximately 3,360,000 acres. The Seneca tribe of Indians was one of the parties to and signatories of the treaties and received as its share of the compensation under the 1817 treaty an annuity of $500, a reservation grant of 30,000 acres on the Sandusky river where they then were living and also, jointly with the Shawnee, at Lewiston where they also were living, an additional reservation grant of 48 square miles. Under the supplementary treaty of September 17, 1818 the Senecas received an additional annuity of $500, plus an additional annuity of $1000 jointly with the Shawnee at Lewiston

and each of the reservations granted under the 1817 treaty were enlarged so as to contain approximately 40,000 acres each.

This petitioner asserted no claim in respect to Area 88.

After extensive hearings the Commission on May 23, 1973 entered its decision, findings and order (30 Ind. Cl. Comm. 337, Appendix B). The decision is to the effect that the ownership of Area 87 was Wyandots 50%, Ottawas 30%, Shawnees 10% and Delawares 10%.

The basic principle of the decision was that the Greeneville Treaty recognized title to those tribes and bands of Indians "who were then using and occupying Royce Areas 87 and 88." And that the "follow up" treaty of September 29, 1817 acted as confirmation of the aboriginal title recognized at Greeneville. (30 Ind. Cl. Comm. 337,344).

The Seneca claim was dismissed on the grounds their predecessors "were not signatories to the Greeneville Treaty and acquired no rights thereunder. Furthermore, these Indians did not possess aboriginal title to Royce Area 87 as of January 4, 1819." (30 Ind. Cl. Comm. 337,368).

The Commission made only one general conclusory finding as to use and occupancy confining it to the general conditions in Ohio occasioned by the Revolutionary War and the Indian hostilities ending in 1795 and reiterating statements of mixed use and occupancy. It found a predominant usage by Wyandots and Ottawas, citing 21 Wyandot sites and 24 Ottawa locations in the period 1754-1819, but added

> "But there are a greater number of references to Indians other than the Ottawas and Wyandots in these

areas, particularly to Shawnees, Delawares, Munsees and Mingos after 1780."

The nature of the use and occupancy, to wit, joint and amicable was not controverted or disputed by the Commission or any of the parties in the consolidated proceedings.

The Commission, in Finding 2, determined that when "Reyntueco" signed the original treaty of Greeneville separately and being described therein as "of the Six Nations living at Sandusky" he did so as a member of a group separately described as "Delawares of Sandusky" and not as a signatory thereto on no discernible positive evidence other than the printed edition of the treaty in Statutes at Large published in 1846 (3 Ind. Cl. Comm. 337,345,359), concluding therefrom that "the predecessors in interest of the Seneca Cayuga Tribe of Oklahoma were not signatories to the 1795 Greeneville Treaty and acquired no rights thereunder" (30 Ind. Cl. Comm. 337,363).*

On a motion for rehearing based upon a photocopy of the original copy of the treaty (31 Ind. Cl. Comm. 359, 370, Appendix C) the Commission, after examination of the photocopy of the original document, delineated all of its features that differed from the printed Statute copy which demonstrated the separateness of the signature and of the party described as "of the Six Nations living at Sandusky", and adhered to its original conclusion that the act of signing made him neither signatory nor party and those

* This notion of the identity and affiliation of Reyntueco had never been raised either at the hearings or in the briefs of the parties and was only indirectly suggested by the Commission at an oral argument shortly before rendition of the decision.

for whom he purported to act acquired no rights thereunder. The Commission apparently relying for this last conclusion upon the emphasis placed upon the word "said" in the body of the treaty, cited and quoted from *Sac and Fox Tribe* v. *United States*, 161 Ct. Cls. 189, cert. denied 375 U.S. 921 (1963) (Appendix C).

The Court of Claims made no reference in its order of May 30, 1975 and the order of October 10, 1975 to this issue.

Reasons for Granting the Writ

1. The holdings of the tribunals below, determining that an erroneous editorial composition, made fifty years after the event, of the basic treaty Agreement between the United States and the Indian Tribes living in the Northwest Territory, setting forth the rights and interests of the Indians, to be the controlling basis for determining the parties who are to be the beneficiaries of that treaty, are flagrantly wrong.

The refusal of the Indian Claims Commission to recognize a party, clearly identified as a signer of the Greeneville Treaty, to be a beneficiary of the solemn promise of the United States given as the prime consideration for the cessation of ten years of hostilities is an act of gross injustice. It also typifies the expression "speaking with a forked tongue".

The Greeneville Treaty gathering was not some casual "get together" to which any passerby would be invited to "come on in and sign this petition" for some political purpose such as zoning. It was a most important diplomatic event and only the representatives of those Indians who

were concerned and were to be affected were present. The Six Nations of Sandusky, or Mingos or Senecas were there. The Treaty Journal bears this out. Every signer of the Treaty, including Anthony Wayne, signed as a representative and the document clearly shows their representation. If all Indian signers other than Reyntueco signed as representatives what then makes him so unique? We can hardly ascribe the action as being a mere courtesy extended to the seeker or giver of autographs. Treaties ratified by the United States Senate are not to be dealt with so lightly.

The Commission has attempted to denigrate the presence, the signature and the identification separate from another tribe living in the described location in its effort to sustain its earlier *ipse dixit* that petitioner's predecessors in interest were not "signatories" by shifting its emphasis to the omission of the name from the preamble and the frequent use of the word "said" in the body of the treaty which contains the agreements. It is to be remembered that the agreement was not prepared by or with the Indians. It was a document of presentation, acceptance or else! Few if any changes occurred between presentation and acceptance. In whose favor is the document to be construed? If only those named in the preamble were to be "signatories" what created the necessity for the separate signing by and for the Six Nations of Sandusky, an identification written not by Reyntueco, but presumably by the draftsman of the instrument? The signature was required only if it was the meaning and intent that those Indians were to be affected and bound by the Treaty. That obtaining the signature may have been an afterthought, a not uncommon occurrence at large and complicated real estate closings held under great pressure does not in any way mitigate or obviate the obligations of the signatory.

The Commission has placed reliance upon *Sac and Fox Tribe* v. *United States*, 161 Ct. Cls. 189 for its determination that petitioner's predecessor in interest was not a signatory of the Treaty. There is a very stark difference between the Sac and Fox and the Senecas. The Sac and Fox were not present at Greeneville; they did not sign the document and they did not cede any lands. The Senecas were present; they signed the document and they ceded their interest in the lands conveyed under the treaty terms.

Since it is readily evident that the "signatory" is separate from and independent of those who signed above him, what effect is to be given to this act? Is the "signatory" deemed not to be a party bound and benefited if not listed in the preamble nor embraced within the narrowest possible literal construction of the word "said"; that then the act is nugatory and meaningless? Or rather is it not the declaratory and meaningful interpretation that the "signatory" is a party bound and affected by and the beneficiary of the agreements expressed in the documents so signed?

The foregoing may seem to be rhetorical belaboring of a single fact in a complex web of events, but when one thinks upon the consequence, one is faced with the realization that here at the beginning it is the end, for the Commission has inexorably applied its conceived doctrine of "exclusive exclusivity" resulting in an absolute foreclosure.

2. The incongruity of the judgments below

The judgments below, by refusing to recognize the compensable interests of the petitioner and then blithely awarding the title to their heritage in equal shares to five other

tribes in Areas 53 and 54 and to four tribes in varying percentages in Area 87, have effected an insupportable rationing of justice.* And as Judge Bennett noted in his dissent from the order of affirmance of May 30, 1975, Appendix A of 1817 Treaty Case, it is indeed too rough to be just.

This petitioner has been deprived of the rights ostensibly given to it under the Greeneville Treaty and they are taken away for no obvious reasons other than a simplistic attempt to confine the meaning and effect of an agreement by the most literal interpretation of the document fortified perhaps by a disinclination to labor in the manner required by the statute, 25 U.S.C. 70n, and as prescribed by the Court of Claims in *Snake or Piute Indians* v. *United States*, 125 Ct. Cls. 241 and possibly a pride of authorship.

Once it has been determined that petitioner's predecessors in interest were not signatories, life becomes simple because have they not said they shared the use of the land with others even to the extent of particularizing with whom and in what place? No exclusivity! That forecloses that claim.

No need to consider Indian possession or occupation with respect to their habits or mode of life (*Mitchell* v. *United States*, 9 Peters 711, 745).

No need to consider the difference between a society founded upon a system of private exclusive property and a society organized primarily upon a communal system.

* Although the Commission rendered separate decisions for each of the 1805 and 1817 treaty transactions the issues involved and the evidence presented were identical with minor exceptions in respect of use and occupancy. Cf. Findings 8 in both cases, Appendix B. And it was agreed that the total of the evidence was submitted in each case.

No need to consider the evidence submitted in substantiation of the assertion of use and occupancy as set forth in Appendix E.

No need to accept the observations and judgments of Lewis Cass and Duncan MacArthur who, when reporting on their negotiations for the 1817 Treaty, stated:

> —"The Wyandots who owned it, and the Senecas and Shawnee who live upon it"—
>
> —"The ancestors of some of these Indians have occupied it for generations"—
>
> —"In fact the whole of the Wyandots and all the Shawnees and Senecas in this quarter have made the last attempt to preserve the inheritance of customs and land transmitted to them by their ancestors."

Nor is there any need to consider the opinion of the Public Lands Committee of the United States Senate when, reporting the Treaty to the Senate with amendments for approval, it stated:

> —"To the Senecas, who made no cession, but are considered as co-partners with the Wyondots"—

All of this has become irrelevant.

Now comes the last problem. If the Senecas did not have a recognized title or an aboriginal title to the lands they used and occupied, what effect does this conclusion have upon the title of the remaining claimants?

At this point the Commission, relieved of the labor of dealing with aboriginal title and seemingly unwilling to deal with the last question, perhaps in an effort to be generous even though not just, proceeded to assess the pro-

portionate interests of the remaining users and occupiers as holders of recognized title and awarded "the whole thing" i.e., recognized title to the whole of the areas including that which has been denied to petitioner by virtue of the Commission's action, to five other tribes in equal shares in respect of Areas 53 and 54 and to four tribes, one of whom was a sometime co-partner of the Senecas in varying percentages. This is accomplished in each case by means of a single conclusory finding, general in content.

Parenthetically it may be noted that one of the recipient tribes of the Seneca heritage in Areas 53 and 54 had only the most tenuous, if any, connection with the areas. In Area 87 the co-partner of the Senecas receives the major share of the Seneca heritage but it may be noted that was a partnership that has been long dissolved.

The incongruity, let alone the injustice, is apparent. It might be epitomized by stating the effect of the Commission's decision thusly

> He who had something has had it made nothing and taken from him and that nothing has been made something.

Justice is a word much abused, but these judgments are an abuse of justice and cry out for correction.

We are not unmindful that this Court has recently refused to review the judgment of the Court of Claims affirming in part the order of the Indian Claims Commission in *Strong* v. *United States,* cert. denied, December 1975 (Dkt. 75-389), but we suggest the instant decisions portray a result which bogles the mind and should not be allowed to stand as an example of justice under law.

The Indian Claims Commission was not created for the purpose of honing broadly stated principles into the thinnest and sharpest cutting edges for use in developing a finely constructed system of legal reasoning. Rather it was intended, though perhaps not perfectly constructed, as a mechanism for achieving solutions that could be called fair and honorable for the long standing complaints of a disadvantaged group. Its semi-political purpose overshadows its legal mechanisms. One unjust result tarnishes its honorable purpose and leaves all of us, let alone the petitioner, poorer.

Conclusion

For the foregoing reasons the writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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